DATE: JUNE 11, 1996

CASE NO: 94-INA-581

In the Matter of

LA BAGEL DELIGHT
Employer

on behalf of

MOHAMMAD HUSSEIN NAJAR
Alien

Before: Jarvis, Huddleston and Vittone
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from La Bagel Delight's ("Employer") request for review of the U.S. Department of Labor Certifying Officer's ("CO") denial of a labor certification application. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On November 12, 1992, the Employer filed a Form ETA 750, Application for Alien Labor Certification, with the New York State Department of Labor ("NYDOL") on behalf of

the Alien, Mohammad Hussein Najar. AF 24-27. The job opportunity was listed as "Cook," and the minimum requirement was two years of experience in the job offered. AF 27. The job duties were listed as follows:

> Prepare, season and cook all food stuffs in restaurant serving American, Italian and Middle Eastern cuisine. Prepare dishes such as lasagna, baked ziti, sausages and pepper, chicken-n-wine, Falafel, Middle East Meat Pies and Fassoul.

AF 27.

The Employer advertised the position as required and received five referrals. AF 32-37. On June 28, 1993, the Employer informed the NYDOL that none of the five applicants had been offered the job. AF 67. The application was thereafter sent to the CO on February 10, 1994. AF 77.

The CO issued a Notice of Findings on February 28, 1994, proposing to deny the application on several grounds. AF 78-81. Among other things, the CO found that the Employer had not shown that the job requirements listed in the application were the minimum necessary for the performance of the job. In this regard, the CO noted that the Alien did not have experience cooking American and Italian food prior to working for the Employer, and she therefore concluded that the Employer had trained the Alien in these job duties. Thus, the CO required the Employer to rebut her finding by either documenting that it would not be feasible for it to train a U.S. worker to perform the job, submitting evidence which clearly shows that the Alien had these qualifications at the time of hire, or reducing the job requirements to meet those which the Alien possessed at the time of hire. AF 80. In addition, the CO indicated that the Employer's rejection of two otherwise qualified applicants, Richard Bogan and Jean Milfort, was unlawful. The CO indicated that applicants Bogan and Milfort were rejected because they did not have "baking experience," despite the fact that the application did not contain a requirement that the applicant have two years of baking experience. AF 78.

The Employer responded with rebuttal on March 29, 1994. AF 82-86. Although the Employer addressed the CO's finding that its listed job requirements do not represent the actual minimum requirements for the job opportunity, it did not offer any documentation rebutting the CO's findings regarding applicants Bogan and Milfort. AF 85. However, a letter written by Employer's counsel, which was included with the Employer's rebuttal, states that "[t]he attempt to hire Bogan/Milfort fell short as they did not have the basic baking experience inherent in the alien herein, as shown." AF 86.

The CO issued a Final Determination ("FD") denying certification on April 6, 1994. AF 94-96. In regard to the Employer's minimum job requirements, the CO found that the Employer's statements confirmed the fact that the Employer trained the Alien in Italian and American cooking. In addition, the CO noted that the Employer did not state why it could not "train or accept a U.S. cook." AF 95. Accordingly, the CO found that:

> [a]s the employer has not documented that the alien, at the time of hire, had the qualifications he is now requiring, and as the employer has not demonstrated why it would not be feasible to train a U.S. worker as he did the alien, employer's rebuttal concerning this issue has not been satisfactorily rebutted.

In addition, the CO noted that the Employer's rebuttal failed to address the rejections of applicants Bogan and Milfort. AF 94.

The Employer filed a request for review and supporting brief on May 5, 1994. AF 102-05.

DISCUSSION

In order to prevent an employer from treating an alien more favorably than it would a U.S. worker, Section 656.21(b)(5) provides that:

> The employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

See ERF Inc., d/b/a/ Bayside Motor Inn, 89-INA-105 (Feb. 14, 1990).

In the NOF, the CO appropriately found that the Alien did not have prior experience with cooking American and Italian cuisine (AF 24) and concluded that the Employer trained the Alien in these job duties. Thus, in order to rebut, the CO indicated that the Employer was required to either (1) document that the Alien at the time of hire actually had experience cooking American and Italian cuisine, or (2) document that the Employer was willing to reduce its requirements to those which the Alien had at the time of hire, or (3) show why it is not feasible for the Employer to train a U.S. worker at this time. AF 80. In rebuttal, the Employer responded in the following way:

> Mohammed was hired to prepare middle eastern cuisine and attract a new clientel [sic], being an experienced cook the transition from middle eastern to Italian to American cuisine required minimal advisement and following recipes & guidelines. Mohammed being an adept baker of meat & spinach pies rolled baked loaves and other dishes, the transition to muffins, crossaints [sic], tea biscuits to Bagels makes him a true asset to a small business.

AF 85.

We note that Section 656.25(e) of the regulations provides that the employer's rebuttal evidence must rebut all of the findings in the NOF and that all findings not rebutted shall be deemed admitted. Here, the Employer's statements do not contain any of the documentation required by the CO to rebut her finding that the job duties as described do not represent the Employer's actual minimum job requirements. As the Employer's statements do not rebut the CO's finding, this finding must therefore be deemed admitted.*See e.g., Belha Corp.,*
88-INA-24 (May 5, 1989) (*en banc*); *Salvation Army,* 90-INA-434 (Dec. 17, 1991). Furthermore, as the Employer failed to rebut the CO's finding that its rejection of applicants Bogan and Milfort was unlawful, this finding must also be deemed admitted. Although we note the letter written by Employer's counsel which contains statements pertaining to the Employer's rejection of applicants Bogan and Milfort, these statements, made by the employer's attorney and unsupported by the statements of a person with knowledge of the

facts, cannot be considered evidence. *See e.g., Moda Linea, Inc.,* 90-INA-424 (Dec. 11, 1991); *Mr. and Mrs. Elias Ruiz,* 90-INA-425 (Dec. 9, 1991). Accordingly, the CO appropriately denied certification.

ORDER

The Certifying Officer's Final Determination denying labor certification is AFFIRMED.

For the Panel:

DONALD B. JARVIS
Administrative Law Judge

DBJ/mg/bg